

To: Trust and ICB  
- Chief Executives  
- COOs  
- Medical Directors  
- Directors of Nursing  
- EPRR Leads

NHS England  
Wellington House  
133-155 Waterloo Road  
London  
SE1 8UG

12 July 2023

cc. Regional  
- EPRR teams  
- Directors  
- Medical Directors  
- Nursing leads

Dear Colleagues,

## Planning for Junior Doctor and Consultant Industrial Action

You will be aware that doctors from the British Medical Association (BMA) will take strike action between 07.00 on Thursday 13 July and 07.00 on Tuesday 18 July 2023 (junior doctors), and 07.00 on Thursday 20 July until 07.00 on Saturday 22 July (consultants).

NHS England and the BMA both wish to ensure that patients remain safe while junior doctors and consultants are taking lawful industrial action.

This letter sets out our joint staff recall position in the event of Industrial Action, updating from our previous joint letter setting out our arrangements dated 13 June. It also seeks to provide clarity in response to a number of queries around what the BMA's definition of Christmas Day service means in practice and the process for derogations for consultants.

### Planning for consultants strikes - what is meant by a Christmas day service?

The NHS and the BMA are working closely together to ensure patient safety is prioritised during this action and have committed to ensure that emergency services remain in place with staffing levels in line with that in place on Christmas Day. The BMA signalled an early intention to strike more than 6 weeks ahead of the strike dates so that trusts can plan their patients lists so that those patients with urgent, time sensitive conditions (e.g. cancer patients) can be managed on alternative days and not have their treatment pathways disrupted.



The BMA's definition of a Christmas Day level of care is an emergency care only level of service. As a starting point we suggest that trusts and departments review what consultant staffing was in place on Christmas Day in 2022, and utilise this as a template to determine staffing requirements for the period of consultant action. In most cases, this would be an "on-call" consultant only staffing model. Patient safety is maintained on Christmas Day and this model of action is designed to ensure that patients who need emergency care during this time are able to access it in a timely fashion, while allowing the majority of consultants to take the lawful industrial action that they voted for.

In a department where all consultants intend to strike, it is reasonable that whoever is currently scheduled to provide the on-call/emergency cover on the strike days continue to do so. However, if the consultant currently scheduled to be on-call on those days intends to strike but other consultants in the department are not intending to do so or are not eligible to strike, it would be appropriate for the trust to reach agreement with non-striking consultants to provide the emergency cover.

To support the above planning, the BMA encourages members to have discussions with department colleagues to ensure emergency cover is in place and to share the outcome of these discussions with employers.

While the level of service provided on Christmas Day, is clear, it is accepted that on Boxing Day, a small amount of scheduled activity occurs for urgent, time sensitive conditions. Given the action lasts for 48 hours, local discussion will be required to identify activity which may be necessary during industrial action, these can include scheduled activity for urgent, time sensitive conditions which would reasonably be expected to take place on a normal Boxing Day. This should include any care where there is a risk of serious harm (e.g. life and limb) to patients caused by delaying or deferring due to strike action. This may also include urgent or time critical services that would typically be provided on a Boxing Day such as urgent palliative and end of life care, dialysis, radiotherapy for cord compression, urgent maternity care, mental health crisis care, critical cancer care etc. Where these areas of care are identified, trusts should work with local BMA representatives to agree appropriate cover via the process outlined in Appendix 1.

Given that in almost all cases, clinical activity cannot go ahead in the hospital without the presence or supervision of a consultant, even if that supervision is remote, the consultants strike is likely to significantly impact upon elective, urgent or non-emergency work.



The BMA has advised their members that elective activity is not scheduled for the strike days. Trusts should work on the basis that staff taking strike action (or providing emergency cover for those taking strike action) will not support scheduled activity.

It will be important for systems and trusts to plan for the entirety of the cumulative period of disruption (both strikes and days in between and either side). Every effort should be made to ensure that urgent elective surgery (P1 and P2), cancer care (particularly for patients who have already been waiting over 62 days, or who are likely to pass day 62 if their appointment needs to be rescheduled), and long waiters experience minimal disruption to their care. For the period of the junior doctor strikes, where appropriate these should be the final cohorts to be rescheduled.

During previous periods of industrial action NHS England has tried to maintain as much planned and elective care as possible. However, action by consultants brings different challenges around safe delivery of activity. Whilst there may be small numbers of consultants who choose not to or are not eligible to take strike action, it is important that trusts and staff work across teams to take a whole pathway approach to determine what, if any, elective activity can safely go ahead, particularly for surgical or other procedures. For any other non-emergency work to go ahead, a full risk assessment would be required in advance on a case-by-case basis. This would need to include an assessment of the support specialities that may be required should a complication occur, the availability of the cover and subsequent risks. Patients undergoing surgery or invasive procedure should be appropriately consented and informed that the consultant strikes are occurring and there will be reduced support available in the event of complications. This risk assessment should be documented for the proposed activity, including which consultants would be providing this cover. Trusts should not plan activity on the assumption that the emergency cover consultant will provide cover as the BMA are clear that the derogation allowing emergency care to continue only extends to services that would run on Christmas Day.

The consultant strikes are different to previous rounds of industrial action involving other staff groups. No other worker can provide cover for consultants, and other staff groups are dependent upon supervision from consultants to be able to work. Almost no activity in a hospital can occur unless it is listed under and supervised by a named consultant. Non-consultant and non-medical staff should not be put in a position where they are asked to perform elective work where this is not under the direction of a named consultant or outside of their competencies. If such activity goes ahead appropriate consultant support must be available and this must be provided by a consultant other than the on-call consultant.

### **Derogation requests *ahead of consultant industrial action***

Both NHS England and the BMA acknowledge that whilst the BMA commitment to a Christmas Day level of service is clear, Christmas Day level of service is usually only in place for one day with some additional activity deferred to Boxing Day. Therefore, in a very small number of cases some scheduled urgent or time critical activity (e.g. dialysis) may be required to operate during the strikes as it would not be appropriate to delay treatment. The BMA's criteria for accepting such requests is set out in Appendix 1 and the BMA is working with NHSE and NHS Employers in order to agree a mechanism to approve such requests. Documentation and templates to support this process will be communicated to trusts shortly, via the National and Regional Operations Centre.

### **Derogation requests *during consultants and junior doctor's industrial action***

This measure is designed to be responsive to patient safety concerns arising during strike action rather than pre-empting impacts of strike action. Therefore, requests for derogations should not be submitted until strike action has commenced and the risk to safety is present. It applies to both Junior Doctor and Consultant strike action, however as the Consultant action includes a commitment to provide emergency cover in line with that available on Christmas Day, we do not expect there to be a need for a derogation request unless there is an unexpected major incident.

Where a local derogation is identified as necessary once the industrial action has commenced, the BMA and NHS England have agreed the medical director or nominated executive director of the relevant trust or trusts should contact the NHS England EPRR team. They will pass details of the situation to the BMA who will then need to agree that the incident can only be mitigated by requesting doctors to return to work. The NHS England national team will then consult with BMA on whether a derogation is appropriate.

Once the BMA has approved a derogation, the local trust may contact doctors and seek their return to work. The BMA will also post to its twitter account that the derogation has been agreed so that it is easy for members to verify it.

Doctors on strike need not return to work unless the need for derogations is confirmed by the BMA aside from in response to major incidents (as set out below).



## **Staff recall for externally declared major incidents with mass casualties**

Both parties acknowledge that, despite the comprehensive contingency plans being put in place, unpredictable events, major incidents, and unexpected and extreme circumstances where mitigations in place fail may require a request for staff to return to work for a limited period to maintain safe patient care.

NHS England and the BMA recognise it may be necessary, as an exception, for a trust to contact doctors in the event of a externally declared major incident with mass casualties explaining the situation and seeking their return to work. The trust and ICB should then follow standard procedures to escalate the incident, in line with the EPRR framework, via on-call routes and NHS England's national team will escalate to the BMA. The Trust will be required to complete and submit a derogation form (in retrospect) to verify the need for the recall. This process does not apply to incidents that arise due to the industrial action itself.

The process is set out in Appendix 2

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P Banfield', with a long horizontal flourish extending to the right.

**Professor Philip Banfield**  
Council Chair  
British Medical Association

A handwritten signature in black ink, appearing to read 'S Powis', with a stylized, looped initial 'S'.

**Professor Sir Stephen Powis**  
National Medical Director  
NHS England



## **Appendix 1 – Approval Process for requests to enable urgent services to continue**

As the strike action is for 48 hours, the BMA/NHSEI and NHS Employers are working to agree a process to receive and review requests for essential scheduled services (e.g. dialysis, urgent radiotherapy etc) that would routinely happen on Boxing Day to be considered, and if appropriate a derogation to be provided.

It will be essential for such requests to be submitted in advance of the proposed action so that they can be considered in a timely fashion. Further documentation and templates to support this process will be communicated to Trusts shortly, via the National and Regional Operations Centre

### **Criteria:**

The request must contain responses to the following questions:

a) Is this essential service routinely provided on Christmas Day Y/N

If YES please provide evidence of activity from December 2022 (e.g. patient booking lists)

b) Is this essential service routinely provided on Boxing Day Y/N

If YES please provide evidence of activity from December 2022 (e.g. patient booking lists)

3. If the answer to questions 1 and 2 are NO and/or no evidence can be provided, a derogation will not be granted.

### **Process:**

1. Trust identifies essential scheduled service that needs to be provided, with options for ICB and regional mutual aid exhausted.
2. Review and support received from ICB Medical Director
3. Request for consideration of derogation is communicated to the LNC and the BMA Industrial Relations Officer.
4. Review and support received from NHS England Regional Medical Director and EPRR team
5. Request sent from Trust to NHS England Regional Operating Centre (ROC) to National Operating Centre (NOC). National Medical and EPRR team will review and if necessary follow up with Region and Trust.
6. Request will be sent from NOC to BMA national team for consideration. The request will be reviewed by the BMA national team and if appropriate a derogation provided. The BMA will aim to review this and communicate a decision within 72 hours of the information being provided by the trust. Decisions will be confirmed via NHS cascade routes and the BMA's Senior Doctor Twitter account.



## Appendix 2 – Process for derogation requests during Consultant and Junior Doctor’s industrial action including unexpected externally declared major incidents with mass casualties

### Process for Derogation requests *during* Consultant and Junior Doctor’s industrial action

